

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re)
)
Comcast Corporation) MB Docket No. 10-56
)

Accepted/Files

To: Marlene H. Dortch, Secretary

For transmission to: The Commission

MAR 24 2016

Federal Communications Commission
Office of the Secretary

DOCKET FILE COPY ORIGINAL

**PETITION FOR IMMEDIATE INVESTIGATION AND IMPOSITION OF CONDITIONS,
MONETARY FORFEITURES, REVOCATION AND/OR NON-RENEWAL OF LICENSES**

HARRY F. COLE
Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street – 11th Floor
Arlington, Virginia 22209
(703) 812-0483
cole@fhhlaw.com

*Counsel for the National Association of African
American Owned Media and
Entertainment Studios, Inc.*

March 24, 2016

No. of Copies rec'd
List ABCDE

0+4

SUMMARY

In an effort to convince the Commission of the counterintuitive notion that its merger with NBC-Universal might advance the public interest in diversity of media, Comcast Corporation "voluntarily" committed to, *inter alia*, carrying four independently-owned and-operated programming services in which African Americans have a majority or substantial ownership interest. Two of these were to be carried within two years of the consummation the merger; the other two were to be carried within eight years of consummation. The Commission's grant of the merger was conditioned on compliance with that commitment.

In repeated reports to the Commission, Comcast has claimed that it has complied with the initial two-network commitment. But Comcast's reports do *not* demonstrate compliance. In fact, they indicate precisely the opposite. And publicly available information underscores not only Comcast's lack of compliance, but also a history of racist antagonism of which its bogus claims of compliance are only the most recent manifestations. Rather than negotiate in good faith with an established program provider owned 100% by an African American, Comcast has chosen to deal with organizations that are nothing more than front organizations, fronts to each of which one prominent African American has lent his name while non-African Americans call the shots and reap the benefits.

This is not the first time Comcast has engaged in such discriminatory behavior, but it should be the last.

If the Commission is serious about promoting authentic diversity of programming and bona fide, non-discriminatory access to economic opportunities, the Commission must immediately undertake a detailed, critical investigation into Comcast's claims of compliance and, on the basis of its findings, impose on Comcast penalties commensurate with the seriousness of its misconduct. And Commissioner Clyburn, in particular, should be leading the

charge in this effort, because it was she who sternly warned, in her concurrence to the grant of the Comcast merger, that she would be “watching closely with my large megaphone in hand” to ensure Comcast’s compliance.

TABLE OF CONTENTS

SUMMARY	ii
BACKGROUND.....	3
<i>The Comcast Conditions</i>	3
<i>Comcast's Claims of "Compliance"</i>	5
<i>Aspire</i>	6
<i>Comcast, GMC and Programming Supposedly Directed to African American Audiences</i>	11
<i>Revolt</i>	15
DISCUSSION.....	17
<i>The inherent incredibility of Comcast's claims</i>	17
<i>The Commission's Complicity</i>	20
CONCLUSION	22

1. In a Memorandum Opinion and Order released on January 20, 2011, the Commission approved applications that resulted in the merger of Comcast Corporation (“Comcast”) and NBC Universal, Inc. (“NBCU”). In awarding the governmental imprimatur to those applications, the Commission, with the concurrence of the Obama Administration’s Department of Justice expressly required that Comcast comply with a number of conditions, some arising from Memoranda of Understanding (“MOUs”) entered into by Comcast. To date, as demonstrated below, Comcast has failed to comply with those conditions. And more importantly, in the intervening five years the Commission has utterly failed either to investigate Comcast’s non-compliance with, or to enforce, those materially significant conditions. Accordingly, the National Association of African American Owned Media (“NAAAOM”) and Entertainment Studios, Inc. (“ESI”) (collectively, the “Petitioners”) hereby demand that the Commission immediately take all appropriate measures – including, but not necessarily limited to, those described herein – to (a) investigate the extent to which Comcast has failed to comply with materially significant conditions imposed upon it by the Commission in *Comcast Corporation*, 26 FCC Rcd 4238 (2011) (“*Comcast Order*”), (b) require Comcast to take immediate corrective measures, subject to rigorous, continuous and ongoing Commission oversight, to ensure future compliance with those conditions and (c) impose such sanctions as may be warranted, including both monetary forfeitures and/or revocation and/or non-renewal of licenses, for Comcast’s flagrant violations of those conditions to date.

2. As we will demonstrate below, since the conditions were imposed, Comcast has consistently failed to honor its commitment to add independently-owned-and-operated programming services in which African Americans have a “majority or substantial interest” – terms the ordinary meaning of which connotes control and majority equity ownership by African

Americans. To the contrary, Comcast's actions – as opposed to its fanciful claims of compliance – reflect nothing but contempt for the Commission, the African American community, the television-viewing public and the integrity of the Commission's processes.

3. In flouting the commitments and conditions to which it “voluntarily” acceded, Comcast has continued on a relentless course of racial discrimination in its program carriage practices that long pre-dated its acquisition of NBCU and that persists even today. And the Commission's failure to date to make even the slightest effort to hold Comcast to its commitments makes the Commission and the Obama Administration complicit in this racially discriminatory conduct. The time has come for the Commission (and the Obama Administration) to acknowledge and act on its statutory duty to uphold the public interest, and to demonstrate that the imposition of conditions was not merely an empty charade, a meaningless gesture intended to create the illusion of diversity advancement and economic inclusion.

4. NAAAOM is an organization of voices across the communications and entertainment industries dedicated to fighting for economic inclusion, including equal access to distribution, investment capital, sponsorship, and other critical resources for 100% African American owned media. Its goal is the creation of sustained equal opportunities to communicate which can help rectify continued racial imbalances in the economy and society as a whole.¹

5. ESI is a fully integrated global media production and distribution company with eight networks of high definition programming, dozens of first-run syndicated shows (which have been nominated for (and won) Emmy Awards), over 5,000 hours of programming, a film distribution company, and a podcast network. It produces and distributes 38 syndicated television series. ESI is the largest independently operated syndication producer/distributor for broadcast

¹ See Attachment A.

television programming. More importantly, ESI is 100% owned and controlled by Byron Allen, making ESI the only global media company of its size 100%-owned-and-managed by an African American individual. Mr. Allen began his career in entertainment as a stand-up comedian in the 1970s, became a television host and personality in the 1980s, and in 1993 entered the television production and media industry by founding ESI. ESI is a member of NAAAOM.

BACKGROUND

The Comcast Conditions

6. When the Commission approved the transfer of control of NBCU to Comcast, the Commission observed that diversity of programming is “one of the guiding principles of the Commission’s broadcast ownership policies”. *Comcast Order* at ¶187. Presumably recognizing the undeniable fact that its proposed acquisition of NBCU would fly in the face of that “guiding principle”, Comcast disingenuously entered into a number of supposedly “voluntary”²

² We purposely place “voluntary” in quotation marks. The ability of the Commission to legally insist unilaterally on the types of commitments included in the Memoranda of Understanding (“MOUs”) was, at the very most, dubious, as Commissioners McDowell and Attwell Baker observed in their joint concurring statement to the decision granting the Comcast applications. (Other Commissioners have since expressed similar concerns about the imposition of conditions as “forced tribute” that an applicant “must offer to mollify the Capitol”. See, e.g., Statement of Commissioner Ajit Pai in MB Docket No. 14-90.)

Despite the questionable legality of “voluntary” conditions, the Commission plainly preferred to impose such conditions. But if the Commission were concerned about maintaining the appearance of non-involvement in the development of the conditions – after all, if the Commission were dictating their terms from the start, how could they be said to be “voluntary”? – how could it communicate to the private parties the types of conditions the Commission might deem to have a favorable impact on the eventual public interest determination the agency would have to make?

One possible mechanism: orchestration, behind the scenes and off the record, of supposedly private agreements that would be submitted as essentially extraneous exhibits to the application. How could the parties to such agreements know just what the Commission might want to see? Closed-door, unreported connections can easily make that happen. Could such connections

Memoranda of Understanding ("MOUs") with various special interest groups, the purpose of which was transparent: to create the misimpression that the transaction might somehow be viewed as benefiting diversity. Specifically, in relevant part the MOUs called for Comcast to commit to

add[ing] at least ten (10) new independently-owned and-operated programming services over the next eight (8) years following closing of the transaction. ... Four (4) of the new networks will be linear video programming services in which African Americans have a majority or substantial ownership interest, with at least two (2) of those services to be added in the first two (2) years following closing of the transaction. The two (2) remaining linear video programming services in which African Americans have a majority or substantial ownership interest will be added within the eight (8) year period following closing of the transaction. In each system that adds one or more of the four (4) programming services, such service(s) will be added to the "D1" digital tier. Such services will be added on commercially comparable and competitive terms to the carriage of the services by other distributors.

possibly occur? Ask former Commissioner Attwell Baker, who left the Commission to become a Comcast executive mere months after voting in favor of the transaction.

And with particular respect to the MOUs in this case, it has been publicly reported that: Al Sharpton lobbied on behalf of Comcast, and more or less simultaneously lent his lobbying talents to a successful effort by Commissioner Clyburn's father, Representative James Clyburn (D-SC), to retain his leadership position in the House of Representatives; Comcast contributed more than \$10,000 to that latter effort, and had also contributed \$140,000 to Sharpton's National Action Network; and Sharpton met with Commissioner Clyburn prior to the Commission's action on the Comcast application.

It should come as no surprise, then, that one of the so-called "African American Leadership Organizations" that entered into one of the MOUs was the National Action Network, on whose behalf Sharpton – who had no apparent experience or expertise in television program production or distribution – was the signatory. And notwithstanding that lack of experience, within eight months of the grant of the Comcast application, MSNBC – a Comcast operation thanks to that grant – gave Al Sharpton a prime-time talk show.

It should also be noted that, while Commissioner Clyburn loudly insisted on the importance of compliance with the MOUs ("I will be watching closely with my large megaphone in hand should these agreements be ignored"), nothing in the record suggests that that "large megaphone" has ever been deployed. All of this might just be pure coincidence, of course – but the confluence of odd circumstances strongly suggests otherwise, and undermines the fanciful notion that the MOUs could legitimately be termed "voluntary".

See *Comcast Order*, 26 FCC Rcd at 4501. Comcast also promised to establish its own Diversity Advisory Councils to “provide advice to the senior executive teams at Comcast” on programming (among other things).

7. In granting the application, the Commission made fulfillment of those “voluntary commitments” a condition of the grant. But in so doing, the Commission made no provision for effective monitoring of Comcast’s performance. All that was required of Comcast were annual reports relating to the conditions.

Comcast’s Claims of “Compliance”

8. On February 28, 2012, Comcast submitted to the Commission its first “Annual Report of Compliance with Transaction Conditions”. At pages 7-8 of that report, Comcast claimed:

Comcast is also well on its way toward meeting and beating the next milestones under this Condition — the launch of two more channels within two years and one more within three years of the Transaction Order — while simultaneously satisfying its separate voluntary commitment with various third parties that a subset of the independently owned-and-operated networks to be added would have Hispanic American or African American ownership or management. On April 4, 2011, Comcast announced that it was seeking proposals for a Hispanic American operated independent network programmed in English to launch by the end of July 2012 and two majority African American owned independent networks that will launch by the end of January 2013. The selection process for these networks began with a request for proposals which was prominently advertised online, in national magazines aimed at the African American and Hispanic American communities (e.g., *Black Enterprise* and *Hispanic Business*), and in trade publications like *Multichannel News* and *Broadcasting & Cable*. Interested parties were directed to visit a special section of the Comcast website to obtain more information about the proposal submission process. Applications were accepted through June 1, 2011.

Comcast received close to 100 proposals for new independently owned-and-operated African American and Hispanic American networks. As explained in more detail in Section Three: Overview of Progress on Diversity Commitments, on February 21, 2012, and following a thorough evaluation process, Comcast announced that it had reached agreements to launch four independent owned-and-operated channel additions well within the time frames required by the Conditions. The two African American owned and operated channels are: *Revolt*, created by superstar and entrepreneur Sean “Diddy”

Combs and MTV veteran Andy Schuon; and Aspire, created by sports legend and entrepreneur Earvin “Magic” Johnson and the Gospel Music Channel. ...

(Footnotes omitted.)

9. Later in its Report Comcast described the two “African American owned and operated channels” in greater detail as follows:

The two African American channels are:

Aspire: Spearheaded by Entrepreneur and NBA Hall of Famer Earvin “Magic” Johnson, in partnership with the Gospel Music Channel, Aspire is dedicated to delivering enlightening, entertaining, and positive programming to African Americans families, including movies, documentaries, short films, music, comedy, visual and performing arts, and faith and inspirational programs. Aspire will celebrate the successes, achievements and accomplishments of the African American community and create new opportunities for the next generation of African American visionaries. The network will launch by summer 2012.

REVOLT: Proposed by superstar and entrepreneur Sean “Diddy” Combs and MTV veteran Andy Schuon, this network is designed to feature programming inspired by music and pop culture, including music videos, live performances, music news, and interviews, and will incorporate social media interaction for music artists and fans. The network has entered into an agreement to launch by January 2013.

Comcast’s report – and the similarly upbeat annual reports filed in 2013, 2014 and 2015 – sound great, don’t they? But let’s examine Comcast’s first supposed successes in more critical detail, bearing in mind that Comcast was obligated to add four (4) new “independently-owned and-operated” networks in which African Americans have a majority or substantial ownership interest, at least two of which networks would have to be added within two years of closing and the other within eight years of closing.

Aspire

10. Comcast’s first supposed success is the “ASPiRE” network. (The trademark – more on that below – for what Comcast refers to as “Aspire” is technically depicted as “ASPiRE”, according to official records of the Patent and Trademark Office. We will refer to it as “Aspire” here, in keeping with Comcast’s apparent preference.)

11. The first question to ask: Is Aspire an “independently-owned-and-operated” programming service in which African Americans hold a “majority or substantial ownership interest”? Those are, after all, the express terms of the Comcast commitment, so compliance with those terms should be the first thing to check for.

12. But Comcast’s report does not provide sufficient information to determine compliance. All it says is that Aspire is “spearheaded” by a prominent African American professional athlete and “entrepreneur”, Earvin Johnson. The precise nature and extent of Johnson’s ownership interest is not disclosed. Since the condition imposed by the Commission expressly called for African Americans to hold a “majority or substantial ownership interest”, one would have thought that the Commission would have required, *at a minimum*, express disclosure of Aspire’s ownership structure to confirm compliance with the condition. That is especially so in view of the fact that the entity formed to operate Aspire – *i.e.*, Aspire Channel, LLC – is a Delaware limited liability company the ownership records of which do not appear to be publicly available. As a result, without disclosure by Comcast of Aspire’s ownership structure, the Commission would have no way of knowing who owns what in that entity. The Commission has not to date sought further information about the precise ownership arrangements underlying Aspire – a failure that suggests that the Commission has no serious interest in assuring compliance with the condition which it imposed.

13. But regardless of Johnson’s actual ownership interest, Comcast’s disclosure demonstrated on its face that carriage of the Aspire network did not meet the specifications of the condition. As described by Comcast, the network would be operated “in partnership with the Gospel Music Channel”. But the condition specified carriage of an “independently-owned-and-operated” service. Operating “in partnership with” another programmer – especially a white-

owned-and-operated programmer that has historically maintained close ties to Comcast – cannot be said to be an “independent” operation. Again, the Commission did not inquire into precisely how Comcast might think this “partnership” arrangement might comply with the condition.

14. And indeed, had the Commission undertaken even minimal investigation in publicly available media, it could (and should) have found published reports that:

Aspire “is managed by its partner, GMC TV, a family-oriented gospel music-themed cable network, and housed in the same office building as GMC”. [“GMC” refers to the Gospel Music Channel.]³

As of February, 2013, Johnson had visited the Atlanta-based offices of Aspire on no more than two occasions and the entire Aspire programming department consisted of one individual who had moved over from GMC.⁴

GMC was expected to provide “operational support for ASPIRE, including affiliate and advertising sales, marketing, programming, production and technical operations.”⁵

Johnson would not personally select programming on the network.⁶

InterMedia Partners, LP, a private equity investment fund founded by Leo Hindery, a white person, reportedly owns 33% of Aspire⁷, and the Yucaipa Companies, managed by Ron Burkle, another white person, has also been identified as an investor⁸, although the

³ See “Inside Magic Johnson’s Perfunctory African-American TV Network”, *The Daily Caller*, February 14, 2013 (<http://dailycaller.com/2013/02/14/inside-magic-johnsons-perfunctory-african-american-tv-network/>).

⁴ *Id.*

⁵ See “Magic Johnson’s ASPIRE Network Launches”, PR Newswire, June 27, 2012, reported at <http://webcache.googleusercontent.com/search?q=cache:uPGGAzk-DygJ:stiletto-nation.com/business-magic-johnsons-aspire-network-launches/+&cd=1&hl=en&ct=clnk&gl=u>.

⁶ See “Magic Mandate”, *The Washington Free Beacon*, February 22, 2012 (<http://freebeacon.com/issues/magic-mandate/>).

⁷ See “Magic Johnson’s ASPIRE Launches ‘Exhale’ with Five Notable Hosts”, *Electronic Urban Report*, May 29, 2014 (<http://www.eurweb.com/2014/05/the-pulse-of-entertainment-magic-johnsons-aspire-launches-exhale-with-five-notable-hosts/>).

⁸ See “Comcast Adds 4 Minority-Owned Nets”, *Variety*, February 21, 2012 (<http://variety.com/2012/tv/news/comcast-adds-4-minority-owned-nets-1118050524/>).

precise level of investment has not been disclosed. (Note the names of Messrs. Hindery and Burkle, as well as InterMedia: they will appear again shortly.)

15. From these and other similar descriptions all easily found on the Internet, the Commission could have determined that serious questions exist about Aspire's bona fides. Indeed, the readily available information already strongly indicates that Aspire in fact was nothing but a front, a sham designed to create the misimpression of compliance with the Comcast condition while, in fact, simply serving as a cover to permit a white-owned, controlled and operated entity, GMC, and its owner, white-owned InterMedia, to acquire yet another cable channel. After all, when a separate, white-owned company takes over "advertising sales, marketing, programming, production and technical operations" – and that company is owned by the same entity that happens to own 33% of Aspire – precisely what aspects of the business remain to be "independently-owned-and-operated" by the supposedly African American company supposedly in charge of the network?

16. The public record supports that conclusion. Rather than set up its own offices, Aspire moved in with GMC in Atlanta. According to the Application for Certificate of Authority for Foreign Limited Liability Company filed with the State of Georgia, Aspire's registered agent in Georgia is Charles Humbard, who happens to be the founder, President and CEO of GMC, and white. And, not surprisingly, that application was submitted to the Georgia state government with a transmittal letter on GMC letterhead.⁹

17. Digging a little deeper, the Commission could also have checked the records of the U.S. Patent and Trademark Office, where it would have found that the application for the trademark "ASPiRE" was submitted on February 17, 2012 – more than two weeks after Aspire

⁹ See Attachment B.

was formed. Having been formed, Aspire could have filed that application itself; alternatively, Mr. Johnson himself could have filed it. But the trademark application was not filed by Aspire, or by Mr. Johnson. Rather, it was filed by, and granted to, Gospel Music Channel, LLC.¹⁰

18. Moreover, had the Commission simply bothered to check the daily programming schedule for the Aspire network, it would have found repeated re-runs of such 1970s vintage programming as *Room 222*, *The Mod Squad* (as frequently as eight hours per day), *Julia* and *The Flip Wilson Show* (as frequently as four hours per day). With all due respect, such programming hardly reflects an interest in attracting and serving a 21st Century African American audience. While the choice of such programming may not make much sense from a public service perspective, it apparently made considerable business sense to Mr. Hindery and InterMedia: according to at least one published report, such stale, out-dated programming was placed on Aspire because InterMedia happened already to own the rights to it.¹¹

19. To summarize, in order to satisfy a condition requiring it to provide carriage to an independently owned and operated network a substantial or majority ownership in which was owned by African Americans, Comcast initially relied, and continues to rely, on Aspire. But the Commission has no idea whether Aspire meets the ownership criterion; published reports strongly indicate that it does not meet the independent ownership/operation criterion; and the

¹⁰ See Trademark Application Serial Number 85546183 (available at <http://tsdr.uspto.gov/documentviewer?caseId=sn85546183&docId=FTK20120221075501#docIndex=21&page=1>)

¹¹ See "Magic Johnson, GMC launch new Atlanta-based cable network Aspire June 27, *Black Legal Issues*, June 27, 2012 (http://www.blacklegalissues.com/Article_Details.ASPX?ARTCLID=e7adbdd03d) ("Charles Humbard, president and CEO of GMC, said 'Soul Train' repeats will be on the [Aspire programming schedule], partly because GMC is majority-owned by InterMedia Partners, which also has the rights to the classic music show.")

programming provided on the Aspire TV network is a gross parody of African American-oriented material much of which appears to be on the schedule simply because the white company with which Aspire is in partnership – and which appears to be in charge of the overall operation of the network – itself already held the rights to the stale, out-dated programming.

20. Comcast has thus provided the Commission no basis at all from which the Commission could legitimately conclude that Comcast has complied with the obligation imposed on it by the Commission.

Comcast, GMC and Programming Supposedly Directed to African American Audiences

21. Importantly, Comcast's failure in this regard *cannot* be attributed to any ignorance on Comcast's part. To the contrary, Comcast's willingness to embrace a white-owned, white-controlled network purportedly providing programming directed to African Americans – as opposed to a network owned and operated by African Americans – is well-established¹², as the history of GMC (the white-owned entity in fact operating Aspire), and its relationship with Comcast, demonstrate.

22. GMC (originally known as the Gospel Music Channel, now known as Up TV) was formed by Charles Hubbard, as noted above. It is, and apparently has always been, owned and controlled by white people – specifically, InterMedia Partners, LP, the white-owned private equity investment fund which reportedly also happens to own 33% of Aspire (with white-owned Yucaipa apparently owning a significant piece of the remaining 67%). GMC's history with both Comcast and African American-owned video networks is instructive.

¹² Indeed, in its MOU with the "African American Leadership Organizations", Comcast described the white-owned Gospel Music Channel as providing "programming primarily focused on the African American community". See *Comcast Order*, 26 FCC Rcd at 4501.

23. In 1999, a group of prominent African Americans¹³ formed the MBC Network, which was intended to serve as an African American-owned-and-operated video programming network to serve African American families. (The name of the entity was changed to The Black Family Channel in 2004. We refer to both MBC Network and Black Family Channel collectively as “BFC”.) From 1999-2002, Comcast carried BFC on numerous systems, eventually reaching a substantial percentage of the 8,000,000 households then served by Comcast. In 2002, however, Comcast stopped adding BFC on its local systems, and advised BFC officials that, to guarantee carriage on additional Comcast systems, they would have to offer Comcast a significant ownership interest in BFC.

24. BFC rejected that demand and, in February, 2003, Comcast announced the creation of TV One, a programming network partially owned by Comcast and directed to the African American family community. At that point, BFC’s expansion onto other Comcast systems effectively stopped in its tracks, while TV One’s carriage flourished throughout the Comcast system. NAAAOM understands that the terms of that carriage – on the basic analog service tier at no charge to the subscriber – were particularly advantageous to TV One, in direct contrast to Comcast’s treatment of the 100% African American-owned Black Family Channel. In multiple additional respects Comcast engaged in a pattern of further discriminatory and anticompetitive behavior favoring TV One and unfairly disadvantaging BFC.¹⁴

¹³ The original members of MBC Network included former world heavyweight champion Evander Holyfield, major league baseball star Cecil Fielder, and Marlon Jackson, a member of the Jackson Five.

¹⁴ Comcast’s anticompetitive misconduct in this regard should come as no surprise to the Commission, as the misconduct described above was set out in detail in an *ex parte* letter filed with the Commission in MB Docket No. 10-56 (*i.e.*, the docket involving the Comcast applications) on January 14, 2011. That letter may be found at

25. Comcast's unfair treatment of BFC placed BFC in a difficult and ultimately untenable financial posture. That led to disputes among the principals of BFC, which in turn led to a transaction by which InterMedia was to invest some \$10 million dollars into what remained of BFC.¹⁵ The result: in 2007 GMC acquired significant elements of BFC's operation, resulting in the shut-down of BFC's cable network. (It reportedly planned to continue to provide Internet-delivered programming.) While the terms of the transaction were not disclosed publicly, at least one report indicated that Comcast was to have an equity interest in what remained of BFC.¹⁶

26. So, thanks in large part to discriminatory and anticompetitive treatment at the hands of Comcast (which unfair treatment favored a competing company of which Comcast was an owner), a 100% African American owned-and-operated video network was essentially taken over by a white-operated company, GMC, which is owned by another white-owned company, InterMedia. And Comcast apparently obtained an ownership interest in what remained of that network.

27. That alone demonstrates Comcast's deplorable track record with respect to 100% African American owned-and-operated program providers. But even worse, the same white-owned companies that benefited from that track record in 2007 – GMC and InterMedia – now again find themselves the beneficiaries of Comcast's largess. As demonstrated above, Aspire TV is little more than a *de facto* subsidiary of GMC (and, therefore, InterMedia). Not coincidentally,

<http://apps.fcc.gov/ecfs/document/view;jsessionid=VjdmRDjB7wszJyV0RhfdP1yVgyZvs3lM44bwJJQN4h6jn31XxVg5!638063854!NONE?id=7021025850>.

¹⁵ See *James & Jackson LLC v. Holyfield et al.*, No. 2006CV124372, (Superior Court, Fulton County, Georgia) (Order on Motion for Summary Judgment, available at <http://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=1037&context=businesscourt>).

¹⁶ See "Black Family Channel shutting down cable operation for move to the Internet", Target Market News (April 26, 2007) (<http://targetmarketnews.com/storyid04270702.htm>).

InterMedia reportedly owns a significant (33%) share of Aspire and is using Aspire as an outlet for programming to which it already owns the rights.

28. And to the very limited extent that Aspire TV might claim any identity separate and apart from GMC, Aspire TV is plainly at a tremendous disadvantage. After all, Aspire TV presumably is supposed to compete with GMC for audience and advertising, since the programming of both is targeted to the African American audience. But if GMC is in practical control of programming and advertising for Aspire TV, GMC has no incentive to promote Aspire TV effectively, because any success Aspire TV might achieve would come at the expense of GMC.

29. So the supposed success story of Aspire which Comcast has touted repeatedly in its annual reports to the Commission is, at best, misleading and, at worst, affirmatively misrepresentative. Indeed, it reflects a patent racial animus: recognizing the value of an authentically 100% African American-owned network, Comcast sought to acquire a significant ownership interest in BFC, only to be rebuffed. Rather than negotiate with BFC in a fair, arm's length manner, Comcast instead joined forces with a radio company operated by African Americans, Radio One, that was apparently willing to accede to Comcast's demands for an ownership interest, presumably in return for creating a new, partially Comcast-owned, network which would receive favorable treatment that would not be available to the 100% African American-owned company unwilling to cut Comcast in. Meanwhile, what remained of BFC was sold off to white owners to whom Comcast happily accorded carriage. And when supposedly forced by the Commission to provide carriage, on a fair and non-discriminatory basis, to an independently owned and operated company owned in whole or substantial part by African Americans, what did Comcast do? It relied on an arrangement that, in effect, benefits only

existing white-owned entities and, possibly, a single prominent African American apparently willing to serve as a front. Comcast's repeated choice of favoring the interests of itself or its white-owned friends over those of 100% African American-owned programmers reflects an astonishing and unacceptable racial animus.

30. In any event, Comcast's carriage of Aspire to satisfy (even in part) the Commission-imposed condition is plainly contrary to both the letter and the spirit of that condition.

Revolt

31. The only other supposedly independent African American network touted by Comcast in the five years since it voluntarily accepted the conditions is Revolt. As with Aspire, Revolt's ownership structure is not publicly available, Comcast did not provide any detailed information about that structure, and the Commission didn't bother to ask about it. While the depth of readily available information about Revolt is considerably less than for Aspire, what information there is loudly echoes what we know about Aspire.

32. Comcast describes Aspire as "[s]pearheaded by Entrepreneur and NBA Hall of Famer Earvin 'Magic' Johnson, in partnership with the Gospel Music Channel". It similarly describes Revolt as "[p]roposed by superstar and entrepreneur Sean 'Diddy' Combs and MTV veteran Andy Schuon". Again, nothing in that description (or elsewhere in Comcast's reports) provides any indication that Revolt complies with the terms of the condition: all we know is that a prominent African American personality is somehow involved. The other identified party – Andy Schuon, in the case of Revolt – is white, just as the other entity identified as to Aspire (*i.e.*, the Gospel Music Network) is white-owned. According to published reports, despite his own substantial financial assets, after putting up some undisclosed "starting finance", Mr. Combs

eventually called on two white sources of funding, a “financial organization called Highbridge” and Ron Burkle.¹⁷ The latter name should be familiar, because he was also identified as an investor in Aspire! And Highbridge? That would be Highbridge Principal Strategies (“Highbridge”) which, along with its subsidiary, HBRV Partners, holds an investment in Revolt. And Highbridge, in turn, is a subsidiary of Highbridge Capital Management, LLC, which in turn is owned by (and operates as a subsidiary of) J.P. Morgan Asset Management, part of the J.P. Morgan Chase & Co. (“Morgan”) operation – and sitting on the board of directors of Morgan is none other than Stephen Burke, who happens to be Chief Executive Officer of NBCU and a senior executive of Comcast (according to the Morgan website). And according to another published source, another “partial” owner of Revolt is ... Comcast itself.¹⁸

33. If Comcast does indeed own a piece of Revolt, that alone would violate the condition that the channels be “independent”. Such ownership would certainly be consistent with Comcast’s demonstrated *modus operandi*, as described above. Of course, the Commission currently has no way of knowing who owns what in Revolt, because the Commission has never asked. Making matters worse, the involvement of Mr. Burkle’s familiar face as well as the plainly-not-African American J.P. Morgan Asset Management underscores, again, Comcast’s apparent unwillingness to work with actual 100% African American-owned media companies. Instead, it appears to prefer to keep the enterprise all in the family, shared with a relatively limited universe of familiar, moneyed white people.

¹⁷ See “Diddy Is Now Worth \$780 Million”, The Coli (January 7, 2014) (<http://www.thecoli.com/threads/diddy-is-now-worth-780-muiiion.179144/page-9>).

¹⁸ See “Sean Combs’ Revolt TV Facing Trouble Thanks to Possible Comcast, Time Warner Merger”, Atlanta Black Star (September 19, 2014) (<http://atlantablackstar.com/2014/09/19/sean-combs-revolt-tv-facing-trouble-thanks-possible-comcast-time-warner-merger/>).

DISCUSSION

The inherent incredibility of Comcast's claims

34. Comcast's claims concerning its carriage of independently-owned-and-operated networks owned wholly or substantially by African Americans are plainly bogus.¹⁹ After five years, all Comcast can point to are two networks, both of which fall demonstrably short of the terms of the Commission-imposed condition that Comcast itself "voluntarily" consented to. Neither network can be said to be truly independent of Comcast: Aspire is obviously a front for GMC, which benefited from Comcast's mistreatment of BFC (as discussed above); Revolt is reportedly owned in part by Comcast and by a component of the J.P. Morgan companies, one of whose directors happens to be a senior Comcast executive. So much for independence.

35. Nor does the Commission have any reason to believe that either Aspire or Revolt is wholly or even substantially owned by African Americans: Comcast has provided no ownership information about either, no such information is easily available to the public, and published reports indicate that both are financed by substantial, white-owned sources. If the Commission's intent was to insure that Comcast would truly make carriage opportunities available to bona fide African American-owned and controlled entities – with the goal of providing new economic opportunities to entities historically deprived of precisely such opportunities – Comcast's actions make a mockery of that intent and that goal. In fact, all Comcast appears to have done is to provide lucrative financial opportunities to well-heeled, white-owned organizations, with two prominent token African Americans serving as window dressing and going along for the ride.

¹⁹ Petitioners are confident that precisely the same is true of Comcast's claims concerning Spanish language programming.

36. What is truly astonishing is Comcast's incredible pretense that Aspire and Revolt were the only two networks that might have satisfied the Commission's condition. First, of course, neither did satisfy that condition. And second, according to Comcast, it received "close to 100" proposals in response to its solicitations. Does the Commission seriously believe that, of those, the only two African American proposals that filled the bill were Aspire and Revolt? The Petitioners know for a fact that that was not the case, because ESI was one of those "close to 100" proponents. As described above, ESI is precisely the type of programmer contemplated by the Commission's condition: it is 100% owned, controlled and managed by an African American, and its already-available²⁰ content is unquestionably attractive, including multiple award-nominated and award-winning programs on eight different channels which can be seen on some of Comcast's biggest competitors (including, *e.g.*, AT&T U-verse, Verizon FIOS, and DirecTV).

37. How can Comcast explain passing over ESI, which clearly satisfies the Commission's condition, in favor of Aspire and Revolt, which equally clearly do not? The seemingly inexplicable nature of Comcast's selection process is more troubling in light of the fact that, even if Aspire and Revolt legitimately satisfied the condition, Comcast would *still* need to add two more African American channels to its line-up to fully satisfy the condition. That need has existed since the Commission's grant back in 2011. Throughout the five years since then, ESI has repeatedly sought carriage on Comcast's systems, and Comcast has repeatedly

²⁰ Both Aspire and Revolt were start-up companies having no track record in programming and no existing inventory of programming – except, of course, for the 1970s vintage programming that white-owned InterMedia happened already to own the rights to, programming which it was presumably happy to provide to Aspire, of which InterMedia apparently owned a significant share and with which InterMedia was in any event a partner through GMC. The suggestion that two start-ups with no available programming could somehow have been deemed preferable to ESI is plainly misleading, if not fraudulent.

rebuffed ESI. Initially, Comcast feigned interest and suggested that carriage might be available at some future time, but over the years even those vague suggestions faded into nothingness, to be replaced by flat-out refusal even to speak with ESI representatives.

38. Nor is ESI's experience in this regard unique. To the contrary, the Petitioners have been advised that Las Vegas Entertainment and Sports Network, Inc. ("LVES"), another 100% African American-owned and operated video network, has for years been given essentially the same run-around by Comcast: vague quasi-promises to consider carriage of their networks, quasi-promises that invariably evaporate with no explanation. The Petitioners understand that the President of LVES – who happens to be a member of the Executive Committee of the Las Vegas chapter of NAACP – has concluded, based on Comcast's treatment of LVES, that 100% African American-owned media cannot get a fair shake from Comcast, notwithstanding Comcast's commitments in the MOU (to which the national NAACP was a signatory).

39. Comcast has never explained its unwillingness to engage in good faith negotiations for carriage arrangements with either ESI or LVES. In view of all the facts and circumstances described above, the Petitioners firmly believe that Comcast is engaging in racial discrimination. Recall the unfortunate history of BFC, a 100% African American-owned company that declined Comcast's overtures to become an investor. Carriage of BFC's programming on Comcast systems dwindled, but when that same programming shifted to white-owned GMC, it was greeted with open arms on Comcast's systems. And even now, rather than carry a wholly independent, 100% African American-owned channel targeting the African American family audience, Comcast instead concocts Aspire, which is nothing more than an offshoot of GMC, operated by GMC. The clear implication is that Comcast is willing to deal with African Americans only to the limited extent necessary to allow Comcast and its various

white-owned compatriots to take advantage of opportunities intended to flow to African Americans. That, in a word, is RACISM.

40. In this connection, it is relevant to note that this is not the only context in which Comcast has been accused of racial discrimination. For example, Comcast recently agreed to pay more than \$7 million in settlement of a lawsuit alleging racial discrimination against African American technicians. *See Brand et al. v. Comcast Corp. Inc.*, No. 1:11cv08471 (U.S. District Court for the Northern District of Illinois). While, in so doing, Comcast disclaimed any discriminatory behavior, its willingness to pay millions of dollars in settlement suggests that the claims were far from frivolous.

The Commission's Complicity

41. Perhaps the most troubling aspect of this horrible tale is the Commission's regrettably culpable role. Whether intentionally or through benign neglect, the Commission has enabled and encouraged Comcast's misconduct. The Commission did not, after all, have to address the supposedly voluntary commitments set out in the MOUs; it could simply have acknowledged them and left it at that. But it didn't. Instead, the Commission affirmatively incorporated those commitments as conditions to its grant. Having done so, the Commission placed upon itself the obligation of meaningfully monitoring Comcast's performance to confirm that Comcast was, indeed, living up to its commitments.

42. The Commission has failed to meet that obligation.

43. Instead, the Commission has allowed Comcast to skate by with minimal showings that, even in their sparseness, establish that the conditions have not been met. The Commission's willful neglect in this regard makes it complicit in Comcast's misconduct. It is one thing for Comcast to discriminate in secret; it is an entirely different thing when that discrimination is

perpetrated under the guise of complying with the order of a federal agency. In the latter instance, a failure by the agency to throw the flag on the non-compliance serves as an imprimatur, a tacit approval of the ongoing misconduct.²¹

44. This is especially so when the Commission has available to it easy means to probe and test Comcast's conduct. To start, the Commission could have read Comcast's facile annual reports, noted that they did not provide sufficient detail to establish compliance, and insisted on the submission of detailed information concerning compliance. This the Commission has not done. Alternatively, the Commission could have undertaken its own informal investigation, much as the Petitioners have done. The Commission would thereby have presumably found the same information the Petitioners found, all of which points to Comcast's non-compliance. That, in turn, could have led to a formal investigation, through which the Commission could have examined the misconduct through its existing enforcement processes. This, too, the Commission has not done.

45. And even if the Commission, for some reason, were institutionally reluctant to insist on compliance with conditions which it had imposed, where has Commissioner Clyburn been for the past five years? It may be that she was duped by all the blue smoke and mirrors enveloping Comcast's application. But that would account only for her concurring vote; it would not account for her subsequent lack of vigilance. Commissioner Clyburn is the one who sternly

²¹ That failure sends a signal not only to Comcast but also to other entities contemplating massive mergers, a signal that a toothless MOU purporting to promote the interests of minority communities will be welcomed by the Commission as a supposed "public interest" factor, even if neither the Commission nor the merging parties ever seriously intend to implement the MOU. And sure enough, in its efforts to secure approval of its merger with Time Warner Cable and Bright House, Charter Communications has taken precisely that approach. *See* <http://www.broadcastingcable.com/news/washington/charter-strikes-memorandum-understanding-diversity-groups/147022>.